No. 15799

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIR DANIEL PITTS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
ROBERT JOHN JENSEN,
Assistant United States Attorney
Chief, Criminal Division,
T. CONRAD JUDD,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEE.

I.

Jurisdictional Statement.

This is an appeal from a verdict of the United States District Court for the Southern District of California, which found the appellant to be guilty of Count Two of a two-count indictment (see Statement of Case, below), which indictment was brought under the provisions of Section 1001 of Title 18, United States Code.

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California.

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the proceedings leading to said verdict by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
Statement of the Case.

An indictment in two counts was filed on January 9, 1957, charging the appellant essentially as follows:

Count One: On or about December 22, 1954, the appellant knowingly and wilfully made false and fraudulent statements and representations in a matter within the jurisdiction of the Department of Defense upon a Personnel Security Questionnaire, to the effect that he had received an Honorable Discharge from the United States Air Force; that he had never been arrested, charged or convicted of any criminal offense except traffic violations; that he had previously been granted a security clearance with the Atomic Energy Commission to the level of secret.

Count Two: On or about October 24, 1955, the appellant knowingly and wilfully made false and fraudulent statements and representations in a matter within the jurisdiction of the Atomic Energy Commission upon a Personnel Security Questionnaire, to the effect that he had never been arrested, charged or convicted of any criminal offense except traffic violations; that he had never been refused clearance by any branch of the Federal Government.

The case was tried by the Honorable William C. Mathes without a jury and commenced on April 25, 1957. The Court returned its verdict on May 16, 1957, wherein it was found that the appellant was acquitted on Count One and found guilty as charged on Count Two.

Judgment was entered on June 3, 1957.

Notice of Appeal was filed on June 7, 1957.

III.

Statement of the Facts.

On December 20, 1954, the appellant Clair Daniel Pitts, Jr., was hired as a Junior Physicist with Litton Industries in Los Angeles, California, under the name of Jack Lang.

It is the general practice of Litton Industries to have the employee fill out an original Personnel Security Questionnaire (PSQ) at the time of employment or hiring. When the company desires that he be cleared for access to classified information, the employee's department head notifies the security director and gives the information or need for his clearance. The original PSQ is pulled out of the employee's personnel folder, typed, and presented to the employee for his thorough examination so that errors or omissions may be corrected. After this is done the employee signs the PSQ, and it is witnessed by an employee of the security department [R.* 95, 96]. It is then forwarded by the company to the proper government agency.

The company was generally interested in government contracts of a classified nature [R. 110]. Before a company could be awarded such a contract, it had to have sufficient technical personnel cleared for security or be willing to clear them [R. 110]. Thus, Litton Company attempted to clear its technical personnel as soon as possible after their joining the company. It had a uniform practice with respect to clearing employees of the junior physicist level [R. 109].

During the year 1955, Mr. Harry Jack Gray served as General Manager of the Components Division and Nuclear

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*Reporter's Transcript.

Electronics Division [R. 104]. He had negotiations with certain government agencies, among them the Atomic Energy Commission [R. 112]. The subject matter of these negotiations involved work of a classified nature [R. 113]. Litton Industries used classified information in some of their projects [R. 108, 109]. During the year 1955, the company was engaged in secret or confidential matters for the Department of Defense [R. 155].

In 1955 Litton Industries applied for an access permit from the Atomic Energy Commission [R. 113]. Such a permit was issued in August, 1955 [R. 114, Ex. 4]. This permit would authorize the company to receive classified information and it was anticipated that classified information to the level of confidential would be released to the company [R. 116, 117]. The company requested that certain additional personnel be passed upon for security clearance so that they could have access to this material. Among these persons was the appellant, known then as Jack Lang [R. 117]. The appellant's status as a "key employee" had been determined by Mr. Harry Jack Gray, Mr. Lang's division head, in the spring of 1955 [R. 111].

When the appellant joined the company in December, 1954, he was hired as a junior physicist. In this capacity it was contemplated that he would assume some of the duties of the senior physicist by engaging in reactor technology work as set forth in the "Application for Access to Information on Nuclear Reactor Technology." The employment category of Senior Physicist was one of the categories specifically included in the application for the

Access Permit and one that would have access to classified information under the permit [R. 125, 126, Ex. 5].

Some of the actual duties performed by the appellant while at Litton Industries were:

> "He was involved in several projects designed to develop an optimum configuration for thulium isotopes, the incapsulation of those isotopes, the performance of loading and unloading radioactive thulium capsules, the measurement of the radiation from these capsules, the taking and development of radiographs, the inspection and radiographing of materials submitted to us by interested parties and various other things" [R. 148].

Prior to making application for the Access Permit, the company promoted the appellant to an intermediate physicist. It was contemplated that he may be promoted to senior physicist [R. 163, 166].

On correspondence and pamphlets prepared by the appellant, while engaged in his duties at Litton Industries, he represented himself to be a physicist and so signed these documents [Exs. B, F-1, F-2, H, I].

In October, 1955, a PSQ under the heading of Atomic Energy Commission was filled out and certified to by the appellant Jack Lang, and submitted to the AEC [R. 175, Ex. 6]. At no time was a clearance of any type issued by the AEC for the appellant [R. 179].

At the time of his executing the PSQ on October 24, 1955, the appellant also executed a document called a Security Acknowledgment, which set forth certain re-

sponsibilities of the applicant in regards to classified information [R. 185, 198, 199, Ex. 7].

After the PSQ was forwarded to an office of the AEC, it was screened by AEC personnel to verify the applicant's position and the need for the clearance [R. 181, 182, 188]. A representative of the AEC was at Litton Industries and was shown by the appellant what his duties were regarding radioactive isotopes [R. 190].

The appellant, to question No. 24 of the PSQ to Atomic Energy Commission, Exhibit 6, answered in the negative, indicating that he had never been arrested, charged, or convicted of any criminal offense except certain traffic violations.

The appellant had in fact been convicted on three prior occasions in the Parish of Orleans, Louisiana [R. 200, Exs. 3, 3-A, 3-B].

In May, 1955, the appellant wrote a letter to the Air Adjutant General, United States Air Force, requesting a review of his undesirable discharge. In this letter, he pointed out the fact that he was working as a physicist for Litton Industries and that application was being made for his security clearance through the AEC [R. 318, 319, Ex. 12]. In this letter, he further claimed to be a physicist at Litton Industries and an Associate Professor of Physics at Fremont College [R. 319].

IV.
ARGUMENT.

Introduction.

Since the appellant was acquitted on Count One and convicted on Count Two, only Count Two will be discussed and no reference will be made to any facts surrounding Count One except as may be pertinent to Count Two.

Conflicts of Fact and Credibility of Witnesses Are to Be Decided by the Trial Court.

It is well settled that an appellate court will not review questions of fact nor weigh evidence where there is any substantial and competent evidence to support a finding of guilt. On review the appellate court will consider the evidence and all the inferences which may reasonably be drawn therefrom from the aspect most favorable to supporting the findings of the court below.

Woodward Laboratories Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853.

And the foregoing is equally applicable to a trial by the court without a jury.

Penosi v. United States, 206 F. 2d 529, 530 (9th Cir., 1953);

C-O-TWO Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

It is submitted that the first three elements of the crime alleged in the indictments—as set forth in the Argument herein—are questions of fact. The appellant has not challenged the sufficiency of the evidence to support the conviction and since there was evidence to support the trial court's decision as to these three points, the appellate court should review those findings from the aspect most favorable to the appellee.

It should be pointed out that the appellant has based many of his arguments and points upon the evidence which is most favorable to him, notwithstanding evidence to the contrary contained in the record and from which the court could have based its conviction.

Elements of the Offense.

In the case of *United States v. Dietrich* (C. C., D. Neb., 8th, 1904), 126 Fed. 676, 685, cited in the appellant's brief, it was held that "In prosecution for criminal offense, the act charged must have possessed, at the time when its commission was complete, every element necessary to its criminality."

Looking then to the particular Statute under which the indictment was brought, we must first determine the elements of this offense. If these elements are all present then the conviction must be affirmed. Under Section 1001, Title 18, United States Code, there are four elements.

A. That a False Statement or Representation Was Made.

In the PSQ submitted to the Atomic Energy Commission by the appellant [Ex. 6], in response to question number 24, asking whether the applicant had ever been arrested, indicted, summoned or convicted in a criminal proceeding, the appellant answered "No." This was in-

itialed by the appellant and the entire document was certified to by him on October 24, 1955. The execution was witnessed by an employee of Litton Industries, Gertrude Lynch, of the Security Department [Ex. 6].

The appellant had in fact been convicted on three prior occasions. Two of these convictions were for single counts of forgery. The third conviction was in two counts; one, for false impersonation of a doctor of medicine; second, for performing acts of a doctor of medicine in a hospital while falsely assuming the character of a doctor of medicine.

B. That Such Statement or Representation Was Made Knowingly and Wilfully.

The events concealed by the appellant's answer to question 24 of the PSQ to the AEC were acts within his past conduct, and in the absence of some showing that the appellant lacked the mental ability to recall them, it must be assumed to have been done knowingly.

On the occasion of his filling out the PSQ on October 24, 1955, he was asked specifically if this was his answer to which he certified that it was by placing his initials by this and other answers [Ex. 6].

On May 17, 1955, a letter was received by the Air Adjutant General of the United States Air Force from the appellant. In this letter he stated that application was being made for him with the AEC for an "L" security clearance [Ex. 12].

On two prior occasions, the appellant had filled out PSQs, so this was not a new experience to him. In 1950 when applying for security clearance while in the United States Air Force, the appellant executed a PSQ. On De-

cember 22, 1954, he executed a form DD-48, PSQ for the Department of Defense, the subject matter of Count One.

Having had this experience, the appellant should have known at a glance what kind of document he was executing and the effect of such an application. As evidenced by the letter to the Air Adjutant General [Ex. 12], he was fully aware of his status as an applicant for security clearance with the AEC. In his letter to the Air Adjutant General, Mr. Lang seemed to use this fact as a compliment to himself attempting to show that anyone who is being considered for such clearance is worthy of a review of his undesirable discharge.

He further represented to the Air Force in this letter that he was employed at Litton Industries as a physicist. This was not qualified by the term "junior" or "intermediate," which was actually his title, but this qualifying term was omitted. This appears to have been done either believing himself capable of performing the work of a physicist or done with intent to mislead the Air Force as to his true position. Certainly he believed himself capable of being a physicist because he represented himself to be employed at Fremont College as an Associate Professor of Physics.

The motive for so concealing these facts is that Mr. Lang had found a good position and he feared exposure which probably would have resulted in his not being cleared or a change in position. The least that can be said is that the false statements were made with knowledge and made wilfully.

C. That the Statement Was Made in a Matter Within the Jurisdiction of an Agency or Department of the United States.

What is the "matter" here which purportedly comes within the jurisdiction of the United States? As pertains to this particular individual, the statement was made on an application for a security clearance with the Atomic Energy Commission. In essence, the appellant desired access to classified information relating to atomic energy. The matter then which is being controlled is classified information on atomic energy. Is this a matter within the jurisdiction of a department or agency of the United States?

In *United States v. White* (D. C. Cal., 1946), 69 Fed. Supp. 562, it was held that "jurisdiction" is synonymous with "power to act." Does the United States have power to act in this matter?

In *United States v. Gilliland* (1941), 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the Supreme Court said that the purpose of this statute, 18 United States Code, Section 1001, is to protect the authorized functions of governmental agencies and department from the perversion which might result from the deceptive practices described.

United States v. Friedus (1955), 223 F. 2d 598, 96 U. S. App. D. C. 133;

United States v. Myers (D. C. Cal., 1955), 131 Fed. Supp. 525;

United States v. Stark (D. C. Md., 1955), 131 Fed. Supp. 190.

Is this an authorized function of government or of any agency or department to control information on atomic energy and specifically that which is known as Restricted

Data? Following are statutes which authorize the Atomic Energy Commission to act in this field:

Section 2201(b) of Title 42, United States Code, gives the Commission authority to establish by rule or regulation the use and possession of nuclear material.

Section 2201(i) authorizes the Commission to provide regulations to protect Restricted Data, protect the security of the program, and national defense, and protect public health and property.

Section 2201(q) authorizes the Commission to pass regulations necessary to carry into effect purposes of the program.

10 CFR Sections 25.11 *et seq.,* govern in part the use of classified material of the Commission.

Section 25.11 provides for an application for an Access Permit and sets forth information that must be furnished by the permitee.

Section 25.22 provides all Access Permits will authorize use of Restricted Data, subject to personnel security clearances.

Section 95.31 requires that no person (here the permitee, Litton Industries) who possesses classified material shall distribute such material to personnel not cleared to proper level.

Here, the company had applied for [Ex. 5], and had been granted an Access Permit [Ex. 4], which permit was issued on August 15, 1955. The appellant executed his application for security clearance, the PSQ to the AEC, on October 24, 1955, after the company had been granted authority to receive restricted data under the Access Permit.

Atomic energy is an area of vast importance to the well-being of the United States. Since the dissemination of this information to individuals incapable of keeping the information secure could result in great harm to the United States, it is necessary to place safeguards around such information.

Its value is not limited to military purposes. The law of physics knows no distinction between military and civilian uses. Its operation is the same under either classification. Still the protection of the information is vital regardless of designation. Thus, atomic energy information may be "classified" in both defense and non-defense projects.

Even though the actual or contemplated duties of the appellant while at Litton Industries were basically of a civilian or non-defense nature as seen above, this does not mean that within this area there can be no classified information.

This is evidenced by the application of Litton Industries for access to non-military restricted data [Ex. 5, Document entitled Agreement and Waiver].

Further, on page 2 of the Application for the Access Permit at paragraph 7(a) under the heading, "7. Specific Undertakings which the applicant (Litton Industries) wishes to pursue under this agreement . . . (b) Study of physical properties and availability of radio isotopes suitable for radiography." As set forth in the Statement of Facts above, the appellant's duties bear the same description in part as does the contemplated activities of the company under sub-paragraph (b) above.

The appellant contends that since he was only interested in the health aspects of physics; that his duties did not

include work on classified information; that the work he was performing did not require him to have access to classified information, he does not therefore come within the jurisdiction of any government agency.

Such an argument is unrealistic and misinterprets the meaning of the statute. The statute does not read, "whoever, within the jurisdiction of . . ." but it reads, "whoever, in a *matter* within the jurisdiction of . . ." (Emphasis added.) The term jurisdiction applies to and qualifies the word "matter" and not "whoever."

If the agency or department has jurisdiction or power to act in the matter or function in question, it is not necessary to show that the person charged stands in the same relationship to the government as does the matter or function. The thing sought to be controlled is the Restricted Data, not Clair Daniel Pitts, Jr., or Jack Lang.

The case of *United States v. Moore* (C. A., Fla., 1950), 185 F. 2d 92, cites the basic proposition that this statute is to be construed within the fair meaning of its terms. Its terms as pointed out above are that the term "jurisdiction" applies to and qualifies "matter."

The appellant points out (in his brief) that his duties did not require access to restricted data. He justifies this by saying that he did not receive any restricted data while at Litton Industries. The appellant is attempting to determine whether or not he should have been applying for a security clearance. He is attempting to judge his abilities in relation to the contemplated activities of the company.

How could the appellant know whether he could or could not perform any work of a restricted nature? Restricted is not synonymous with complicated. Further, the appellant had no knowledge of the contents of the access permit,

the negotiations with the AEC, the work necessary under the negotiations or of the contemplated contracts. This is assumed because of the restricted nature of these things. This is believed to be true even though the appellant had an understanding that he would be working on classified projects [Ex. 12].

In order to determine how many employees of which particular employment categories will be required to fulfill any contemplated contract, the company must first have preliminary negotiations with the AEC. These negotiations took place between the AEC and the company [R. 112, 113]. The company and the AEC were the only ones aware of what it would require in the way of manpower to do the contemplated work. The justification that the appellant asserts that he never worked on restricted data is no explanation at all. The testimony at trial showed that the appellant had never been granted a clearance of any kind [R. 179]. Section 25.22 of 10 CFR requires that no one can disseminate restricted data to uncleared persons. Since the appellant had not been cleared, he could not receive restricted data.

Thus, the company, which was in a position to know the requirements of atomic energy contracts was the proper one to determine who should be processed for clearance. In effect, the appellant and the company are requesting clearance so that the appellant may have access to classified information, after it is received by the company under either the access permit or a contract with the AEC.

Does the statute only apply to those who are required by some statute or regulation to make the statement?

This is a primary contention of the appellant, but the appellee believes it is not supported by case law or the

regulations. According to the Atomic Energy Commission Manual, Section 2302-03, the following definition is set forth:

> "AEC security clearance is an authorization which permits an individual to have access to Restricted Data and other classified matter as may be required in the performance of his duties involved with employment or assignment." (Cited in App. Br. p. 41.)

The appellee's interpretation of this regulation is as follows: Taken in the order of the appearance of the words, the security clearance comes first, a requirement which must be met before anyone can receive any classified material. The language of this regulation does not state that before a clearance is granted, the employee must be shown to require the material in his assignment. If this were the case, a clearance would have to be made each time an assignment required an employee to have access to such material. Rather, the clearance is a preliminary blanket approval of the individual's character, fitness, background and his trustworthiness. This clearance in itself is not authorization for specific data. To receive particular documents, charts, blueprints, etc., an employee must then show to the person charged with control of such documents that his particular assignment requires that he have access to this particular document, etc. The regulation described above setting forth such a "need to know" is not a condition precedent to the granting of the clearance, but is a condition precedent to the giving of *particular* classified information. If this were not the case, then every person cleared to the level of Confidential for example, would have a right to examine every confidential document wherever found or used in any project by any contractor whatsoever.

Such a situation would be most impractical and would not aid in the control of restricted data, which is one purpose of these regulations. Even though an individual is cleared, this is no guarantee that he will uphold his trust. So, to minimize the danger of possible unauthorized dissemination, this regulation permits that only such classified material be given to an individual as may be shown to be required by his assignment.

The cases decided under this statute do not hold that the statement be required under some statute or regulation. In the case of *United States v. Cohen* (1953), 201 F. 2d 383 (C. A. 9), this court said that Section 1001 of Title 18, United States Code, is not limited to statements which are required to be made by some law or regulation, and therefore, the giving of false statements voluntarily to Agents of the Treasury Department regarding declarant's financial affairs, was a violation of this section. (See also, *United States v. Meyer* (1944), 140 F. 2d 652 (C. A. 2), where declarant could have declined to answer questions at an exclusion hearing, however, chose to answer voluntarily, but lied. The question of requirement to answer was not considered by the court.)

Here, the appellant was under no compulsion to submit the PSQ to the AEC, but did so and included therein a false statement. He could have refused to submit one, but once he did, he then came within the provisions of the statute in that he must answer truthfully or suffer the legal consequences.

Finally, since the statutes and regulations mentioned above grant authority to the Commission to have jurisdiction over the dissemination of restricted data as relates to atomic energy, the matter within such jurisdiction of the AEC as pertains to the appellant is the power to act

or decide on whether or not he shall be granted a security clearance, which clearance if granted, would entitle him to have access to restricted data on atomic energy.

One of the factors to be considered in deciding this question was the criminal background, if any, of the applicant, Mr. Lang. This brings us to the last issue here raised.

D. That the Statement Made, Falsified, Concealed or Covered Up a Material Fact.

In *Ebeling v. United States,* 248 F. 2d 429 (8th Cir., 1957), where the defendant was indicted under Title 18, United States Code, Section 1001 for making false statements, the court pointed out that it is a violation of Section 1001 for anyone wilfully to make or use a false writing or document knowing it to be false and intending that it shall bear a relation or purpose as to some matter which is within the jurisdiction of a department or agency of the United States, and with the false statement which it contains having a materiality on the department or agency matter.

It has been judicially determined that the question of relevancy is not open to one who knowingly makes false statements with intent to mislead the government. This was the holding in *United States v. Eisler,* 75 Fed. Supp. 634 (D. C., D. C., 1947), where the defendant made false statements in an application for permission to leave the United States.

Assuming for purposes of argument that the District Court in the *Eisler* case was incorrect and that the ques-

tion of materiality and relevancy is still open to one who knowingly makes false statements with intent to mislead the government, it is submitted that information as to prior criminal activities is of utmost importance in respect to the position of trust and confidence which a person working in sensitive areas occupies. Atomic energy information is an important factor to the maintenance of the economy, progress, security and independence of the United States. If the United States is to maintain these blessings, it is imperative that such vital information be kept out of hostile hands. The purpose of the security plan is to screen those persons who might come into contact with this vital information so that only those who are trustworthy are permitted access to it.

The government is not trying to equate prior criminal activity with leakage of vital information. However, prior criminal activities have a bearing on ones social conduct. It is some evidence of character and fitness. As pointed out in *United States v. De Lorenzo,* 151 F. 2d 122 (C. C. A. N. Y., 1945), where the defendant made false statements about prior criminal activities and employment on an application for Federal employment, the court held:

> "It cannot be said that the questions asked were irrelevant. Those in both 37 (*re:* prior employment) and 15 (prior criminal activities) bore on his social conduct and on his qualifications. The objection to the jurisdiction of the Civil Service Commission to make such inquiries seems to us wholly unsubstantial."

In *United States v. Marzani,* 71 Fed. Supp. 615 (D. C. D. C., 1947), the court ruled as a matter of law that ques-

tions concerning communist activities and use of false names were pertinent, relevant, and material in evidencing the defendant's character and fitness, for they had a direct bearing thereon. In the words of the court it was stated:

> "In view of the authority of the agencies involved (*i.e.,* F. B. I.; Civil Service Commission; Department of State), the court holds as a matter of law that the questions propounded of defendant were pertinent, relevant, material, and well within the scope of the investigation as to the defendant's character and fitness, for they had a direct bearing thereon. This is doubly true in time of war, and particularly in view of the character of the agencies involved and the nature of the work with which they were charged."

The court went on to say that if falsehoods are imposed upon persons charged with the duty of ascertaining these qualifications and made to take the place of facts, then the United States is defrauded.

The reasoning set forth in the *Marzani* case above well applies to this case. At the time the PSQ in question was executed this country was engaged in a nuclear achievement battle with certain aggressive nations. Today, the battle still goes on. Atomic energy is important to this country for many reasons. First and foremost is its use as a potential defense to this country against aggression. In this day of continual unrest among the nations of the world, where armed aggression may take place at any time, the effectiveness of atomic energy as a defense would be greatly reduced should the laws of its operation be disclosed to a future aggressor. Atomic energy information to the United States is like a trade secret is to a corporation

in private competition. As long as the information remains secret, the corporation holds a commanding advantage over its competitors. But as soon as the secret is no longer secret, the advantage is lost. Losing any advantage we now possess or shall possess could be disastrous to this nation.

The importance of this work is demonstrated by the agencies which were concerned and involved in this particular case: the Federal Bureau of Investigation, the Civil Service Commission and the Atomic Energy Commission. These are the agencies charged with the responsibilities of preserving and protecting this information.

In *United States v. Giarraputo,* 140 Fed. Supp. 831 (D. C. N. Y., 1956), which factually is very similar to the case at bar, the defendant was employed in a sensitive area. On a Department of Defense PSQ he falsely denied any prior criminal activity. The court in pointing out the necessity of rigid requirements as to the character and integrity of persons who come into contact with sensitive material stated:

> "There is no doubt as to the materiality of the falsification here charged."

The relationship between allowing only people of good moral character access to classified materials and the preservation of security is obvious. Persons in sensitive positions must be free from external pressures of possible blackmail or pressure groups, so that no influence can make him divulge information contrary to the security of the United States.

V.
Conclusion.

It is submitted that the trial court committed no error as pertains to Count Two of the indictment; that all of the essential elements of the crime therein charged were sustained by the evidence; that there was sufficient evidence upon which the court could base its verdict; and that therefore, the judgment of the trial court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

T. CONRAD JUDD,
Assistant U. S. Attorney,

Attorneys for Appellee.